COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2240 **Cir. Ct. No. 2013CV501**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ROBERT B. TOWNSEND, TIMOTHY HOPFENSPERGER, JEFFREY L. MARTIS, MONICA SCHOEN, DAVID E. MCCARTHY AND BRUCE P. MORIARTY,

PLAINTIFFS-APPELLANTS,

V.

NEENAH JOINT SCHOOL DISTRICT,

DEFENDANT-RESPONDENT,

COMMUNITY INSURANCE CORPORATION,

INTERVENOR.

APPEAL from orders of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J. and Hagedorn, J.

¶1 REILLY, P.J. Plaintiffs, a group of teachers employed by Defendant Neenah Joint School District (Neenah), appeal from two orders of the circuit court granting summary judgment to Neenah. Plaintiffs filed this action for promissory estoppel, unjust enrichment, negligent misrepresentation, and strict responsibility misrepresentation after Neenah voted to amend the retirement benefits plan provided for in the district's collective bargaining agreement (CBA) after the enactment of 2011 Wis. Act 10. The circuit court granted Neenah's motion for summary judgment on the theory of governmental immunity pursuant to WIS. STAT. § 893.80(4) (2013-14),[1] thereby dismissing Plaintiffs' claims. We affirm the circuit court, based not on a theory of governmental immunity, but on the ground that having repeatedly bargained for two-year agreements, which set forth all material terms of the bargain, Plaintiffs may not now replace their contract claim with tort, quasi contract or unjust enrichment claims.

BACKGROUND

¶2 Neenah provided a supplemental retirement plan to its teachers under a series of CBAs between Neenah and the Neenah Education Association (NEA),[2] the material terms of which changed over time due to negotiations.[3] The

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The negotiators were a group of teachers who were members of the NEA.

[3] Over the years, whenever changes were made to the CBA, the changes were made prospectively so they only impacted those teachers that had not yet been hired.

final CBA was effective July 1, 2009, through June 30, 2011.[4] The retirement plan had two components: (1) a monetary stipend and (2) a medical benefit. A teacher who met the age and years of service requirements could retire and receive a supplemental retirement stipend equal to fifty percent of his or her base salary in his or her final year multiplied by eight or ten, depending on certain factors.[5] The CBA also included a provision called the "evergreen clause," which provided that "[s]hould the parties fail to reach agreement on a new Agreement … this Agreement shall continue in full force and effect until such time that the terms and conditions of the new Agreement are fully resolved." This clause was recognized as an important provision preventing Neenah from unilaterally terminating or changing the retirement plan after a CBA expired.

¶3 In 2011, the Wisconsin Legislature passed 2011 Wis. Act 10 (Act 10), which, among other things, specifically prohibited employees from collectively bargaining on issues other than base wages. WIS. STAT. § 111.70(4)(mb)1. Plaintiffs concede that Act 10 effectively voided the protective provisions of the evergreen clause. The constitutionality of the public policy changes contained in Act 10 were upheld by our supreme court. ***Madison Teachers, Inc. v. Walker***, 2014 WI 99, ¶164, 358 Wis. 2d 1, 851 N.W.2d 337.

[4] The district also entered into individual contracts with each teacher on an annual basis pursuant to WIS. STAT. §§ 118.21 and 118.22. The annual contracts included the teachers' individual salaries, but the contracts did not address other benefits of employment. The individual contract provided that a "teacher is to … faithfully perform all the duties required of a teacher employed by the Board and to direct such other school activities as may be designated by the principal of the school" for a set term and a set wage.

[5] The retirement stipend was a one-time disbursement, payable in equal monthly installments over a ninety-six- or 120-month period.

¶4 As of June 30, 2011,[6] Act 10 prohibited Neenah from bargaining or contractually agreeing to any provisions other than base wages. WIS. STAT. § 111.70(4)(mb)1. In response, Neenah drafted an employee policy manual, which established policies and procedures to address benefits and the terms and conditions of employment that had previously been addressed in the CBA. Neenah provided that the retirement plan would not change for the 2011-2012 school year to allow teachers eligible for retirement to receive the benefits provided for in the CBA.[7]

¶5 Subsequently, Neenah voted to amend the retirement plan benefits. The amended plan took effect on October 2, 2012, and applied to those retiring on or after that date. Neenah does not dispute that the amended plan provides reduced supplemental retirement benefits compared to those provided in the CBA.[8]

¶6 Plaintiffs brought suit based on claims of promissory estoppel, unjust enrichment, negligent misrepresentation, and strict responsibility misrepresentation. Plaintiffs assert that Neenah negotiators promised the CBA retirement plan to the teachers in return for lower salaries and benefits, which resulted in the teachers being paid lower wages over the life of their careers with

[6] The parties do not dispute that the 2009–11 CBA is enforceable as Act 10 provided that where employees were already covered by a CBA, Act 10 would first apply when "the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." 2011 Wis. Act 10, § 9332(1).

[7] There is no dispute that Neenah complied with its contractual obligations to provide retirement benefits to teachers who were eligible to receive them before the changes under Act 10 went into effect.

[8] Four of the named Plaintiffs claim that they have each suffered approximately $257,025.60 in damages as a result of the reduced benefits.

the promise of the retirement plan as called for in the CBA. Neenah filed a motion for summary judgment seeking dismissal of all Plaintiffs' claims.

¶7 The circuit court determined that all Plaintiffs' claims were barred by governmental immunity pursuant to WIS. STAT. § 893.80(4) and granted summary judgment.[9] Plaintiffs appeal.[10]

DISCUSSION

¶8 While the circuit court granted summary judgment on the grounds of governmental immunity,[11] and we agree, we affirm on more narrow grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we

[9] The circuit court issued two orders in this case: one granting Neenah's motion for summary judgment and dismissing all claims asserted by Plaintiffs Robert Townsend and Bruce Moriarty, and the second dismissing the identical claims of Timothy Hopfensperger, Jeffrey Martis, Monica Schoen, and David McCarthy. Plaintiffs Hopfensperger, Martis, Schoen, and McCarthy stipulated that since the legal claims they asserted are the same as that of Plaintiffs Townsend and Moriarty, they agreed to the entry of summary judgment against them for the reasons stated by the circuit court.

[10] We request, per rules of appellate procedure, that citations be made to the record. The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

[11] WISCONSIN STAT. § 893.80(4) provides as follows:

> No suit may be brought against any volunteer fire company organized under [WIS. STAT.] ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Section 893.80(4) "assumes negligence, focusing instead on whether the [government] action (or inaction) upon which liability is premised is entitled to immunity under the statute, and if so, whether one of the judicially-created exceptions to immunity applies." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

decide cases on narrowest possible grounds). Plaintiffs acknowledge that the CBA did not include a provision that vested any of the retirement benefits after the expiration of the CBA. They admit that Neenah did not breach the CBA with the teachers. Instead, Plaintiffs' claim is strictly for breach of a promise to continue a negotiable and expired contract term that can no longer exist given the prohibitions on what can be bargained for under Act 10. Act 10 changed the game for everyone and Neenah is not liable for acting within the confines of the law.

Standard of Review

¶9 Whether the circuit court properly granted a motion for summary judgment is a question of law we review de novo. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189. We utilize the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 As with other contracts, we interpret CBAs independently of the determinations made by the circuit court. ***Roth v. City of Glendale***, 2000 WI 100, ¶15, 237 Wis. 2d 173, 614 N.W.2d 467. Plaintiffs allege four causes of action in the complaint: (1) promissory estoppel, (2) unjust enrichment, (3) negligent misrepresentation, and (4) strict responsibility misrepresentation. We address each.

Promissory Estoppel

¶11 Plaintiffs' promissory estoppel[12] claim rests on Neenah's repeated promises before employment and during the CBA negotiations that the retirement benefits would be available to teachers upon retirement. According to Plaintiffs, the teachers acted in reliance on those promises and in exchange "provided services, accepted salaries below fair-market value, and declined employment with other employers, all to the benefit of Neenah." Plaintiffs claim that injustice can only be avoided by enforcing the promises Neenah made to Plaintiffs.

¶12 The fatal flaw to Plaintiffs' promissory estoppel claim is that a claim for promissory estoppel arises only when there is no contract. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶53, 262 Wis. 2d 127, 663 N.W.2d 715 ("Promissory estoppel, however, rests on a theory separate from contract; a claim for promissory estoppel only arises when there is no contract."). Retirement benefits were a material term under each two-year CBA, and there was no contractual guarantee of the amount of the future payment of retirement benefits beyond the term of the CBA.

¶13 Plaintiffs argue that "promissory estoppel is always based on a plaintiff's immediate detrimental reliance on a defendant's promise to do something in the future…. even though such promise is not in a contract."

[12] Wisconsin courts first recognized a claim for promissory estoppel in ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). There, our supreme court held that three questions must be answered affirmatively to give rise to a claim of promissory estoppel: "(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? (2) Did the promise induce such action or forbearance? (3) Can injustice be avoided only by enforcement of the promise?" ***Id.***

Plaintiffs point to ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), where Hoffman was induced to take actions in reliance on Red Owl granting him a franchise. ***Id.*** at 697. When Red Owl failed to honor its promises, Hoffman prevailed on a promissory estoppel theory. ***Id.*** at 698-99.

¶14 We distinguish this case from ***Hoffman*** on one key factual issue: There was no contract in ***Hoffman***. Here, Neenah and the teachers negotiated all the material terms of the agreement and there was no guarantee that the retirement benefits would be available beyond the term of the CBA.

¶15 Plaintiffs also argue that the circuit court failed to apply our supreme court's holding in ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 321 N.W.2d 293 (1982), which created an exception to recovery on a promissory estoppel claim when a valid contract was created between the parties. In ***Kramer***, the court found that the lease agreement represented one small aspect of a larger business relationship; thus, since the lease agreement did not incorporate the obligations of the separate business endeavor, plaintiff was allowed to recover under promissory estoppel. ***Id.*** at 424. Plaintiffs assert that under certain circumstances, parties can rely on promises not memorialized in a contract. According to Plaintiffs, the circuit court erred by failing to determine the scope of the contract and whether it represented the "total business relationship." We disagree.

¶16 Here, the CBA incorporated the very obligation that Plaintiffs seek to continue: the retirement benefit agreement. The CBA presented a clear contractual relationship that addressed all the essential elements of the "total business relationship." The CBA was a fully formed, written agreement that included the entirety of the terms between the parties, not a vague agreement as in

Kramer. Under Wisconsin law, alleged promises made during CBA negotiations cannot form the basis of a promissory estoppel claim if there is a contract that addresses the essential elements of the business relationship. *See* ***McLellan v. Charly***, 2008 WI App 126, ¶¶52-53, 313 Wis. 2d 623, 758 N.W.2d 94 (accepting the circuit court's reasoning that "the doctrine of promissory estoppel was not intended to convert contract negotiations into an enforceable promise").

¶17 Each CBA was a limited-term contract. Aside from the evergreen clause, which Plaintiffs admit was legally rendered void by Act 10, there was no guarantee of future payment of retirement benefits in the contract. The circuit court properly granted summary judgment on Plaintiffs' promissory estoppel claim.

Unjust Enrichment

¶18 Plaintiffs' claim of unjust enrichment is based on the benefit that was "conferred upon Neenah by and through the receipt of services furnished by the Teachers at less than fair-market salaries for years based upon Neenah's promises concerning the Retirement Plan." The circuit court found that a claim for unjust enrichment cannot stand where there is a valid contract. Plaintiffs disagree, arguing that "only *enforceable* contracts bar equity." According to Plaintiffs, ***Continental Casualty Co. v. Wisconsin Patients Compensation Fund***, 164 Wis. 2d 110, 473 N.W.2d 584 (Ct. App. 1991), stands for the proposition that because the CBA "is no longer 'a valid, enforceable contract' it does not bar equity."

¶19 As with promissory estoppel, we conclude that the existence of a contract is fatal to Plaintiffs' argument. Unjust enrichment is inapplicable where there is a valid, enforceable contract. *See* ***Continental Cas. Co.***, 164 Wis. 2d at

118 ("The doctrine of unjust enrichment does not apply where the parties have entered into a contract."). The parties entered into a contract—the CBA. The factual circumstances creating the alleged unjust enrichment—lower salaries in exchange for the retirement plan—arose as a result of contract negotiations, which resulted in a valid, enforceable contract. Plaintiffs were aware that the CBA was only valid for a set term, after which new negotiations would need to take place.[13] The fact that a contract period expired coupled with an unforeseen change in circumstances does not mean that a claim for unjust enrichment arises.

¶20 The public policy changes enacted by Act 10 were significant and perhaps unforeseen; however, as stated in ***Northern Crossarm Co. v. Chemical Specialities, Inc.***, 318 F. Supp. 2d 752, 767 (W.D. Wis. 2004), "It is of no consequence that the bargained for exchange might seem inequitable in light of subsequent unforeseen changes in circumstance…. Unjust enrichment is not a mechanism for correcting soured contractual arrangements." The CBA addressed the material terms of the retirement plan and was a valid, enforceable contract. Plaintiffs' claim for unjust enrichment cannot survive summary judgment.

Negligent Misrepresentation & Misrepresentation: Strict Responsibility

¶21 Plaintiffs claim that as a result of Neenah not continuing to provide the retirement benefits found within the final CBA that Neenah was negligent in making representations regarding the retirement benefits. Plaintiffs also allege

[13] Prior to Act 10, WIS. STAT. § 111.70(4)(cn) (1999-2000) provided that "every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year."

strict responsibility misrepresentation[14] based on the same factual allegations as its negligent misrepresentation claim. According to Plaintiffs, by reducing the retirement plan benefits, representations as to the amount of the benefits upon retirement were untrue, and Neenah "necessarily ought to have known the truth or untruth of those statements."

¶22 We conclude that Plaintiffs' allegations cannot support a claim of either negligent misrepresentation or strict liability misrepresentation. In ***Tatge v. Chambers & Owen, Inc.***, 219 Wis. 2d 99, 579 N.W.2d 217 (1998), Tatge commenced suit against his employer, arguing wrongful discharge, breach of contract, and negligent misrepresentation before a jury. Our supreme court refused to find that employers have an independent duty to their employees to refrain from misrepresentation. ***Id.*** at 107. The court explained, "We decline to give our blessing to such an irreverent marriage of tort and contract law." ***Id.*** According to the court, "[t]here must be a duty existing independently of the performance of the contract for a cause of action in tort to exist." ***Id.*** (citation omitted).

¶23 In ***Mackenzie v. Miller Brewing Co.***, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739, an employee sued Miller Brewing Co. for an intentional

[14] Strict liability misrepresentation and negligent misrepresentation require the following elements: (1) the representation must be of a fact and made by the defendant, (2) the representation of fact must be untrue, and (3) plaintiff must believe such representation to be true and rely thereon to his or her detriment. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980). "Strict liability misrepresentation also requires: (1) the representation be made on the defendant's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement; and (2) the defendant must have an economic interest in the transaction." ***Kailin v. Armstrong***, 2002 WI App 70, ¶40 n.23, 252 Wis. 2d 676, 643 N.W.2d 132. Whereas "negligent misrepresentation requires the defendant: (1) have a duty of care or a voluntary assumption of a duty; and (2) fail to exercise ordinary care in making a representation or in ascertaining the facts." ***Id.***

misrepresentation that led him to continue his employment instead of seeking a new position. The court refused to overrule its decision in ***Tatge***, finding that the employee in ***Miller*** had failed to state a cause of action under Wisconsin law. ***Miller***, 241 Wis. 2d 700, ¶¶15-16. The court explained that "the insurmountable obstacle is that Wisconsin does not recognize a cause of action for the tort for intentional misrepresentation to induce continued employment." ***Id.***, ¶10. The court recognized that the employee in ***Miller*** was seeking to circumvent the holding in ***Tatge*** by pleading damages that arose independently of the performance of an employment contract, but the court reiterated that "no duty to refrain from misrepresentation exists *independently* of the performance of the at-will employment contract." ***Miller***, 241 Wis. 2d 700, ¶15 (quoting ***Tatge***, 219 Wis. 2d at 108) (alteration in original). The court concluded that the employee was attempting to "shoehorn a tort cause of action into his at-will contractual relationship," and the court rejected this attempt and "emphasize[d] the need to preserve the boundary between tort law and contract law." ***Miller***, 241 Wis. 2d 700, ¶26.

¶24 In this case, Plaintiffs allege that Neenah's representations that a set amount of retirement benefits would be available to teachers upon retirement induced Plaintiffs to continue their employment with Neenah instead of seeking opportunities elsewhere. Based on our holding in ***Miller***, Plaintiffs' claims for negligent misrepresentation and strict liability misrepresentation must fail.[15]

[15] Plaintiffs devote a large portion of their brief to arguing that Neenah violated Wisconsin open meetings law during Neenah's "[c]ampaign" to eliminate the retirement plan. Plaintiffs also argue that Neenah's "[c]ampaign" was based on knowingly false claims regarding the cost of the retirement plan. Since we conclude that Plaintiffs' misrepresentation claims fail, we will not specifically address these claims, except to note that regardless of how or why Neenah amended the retirement plan after the enactment of Act 10, Neenah was well within its right to do so.

When there is an employment relationship between parties that is confirmed by an employment contract that addresses the material terms covered by the alleged misrepresentations, we will not replace contract claims with tort claims.

¶25 The Plaintiffs argued in the circuit court, however, that ***Miller*** and ***Tatge*** were inapposite because not "all misrepresentations were made during the employment relationship" and the employment relationship was "at will."[16] Plaintiffs contend that the retirement plan was meant to "attract and encourage" teachers in order to induce them to accept employment with Neenah prior to any employment relationship, and Plaintiffs claim they were told these benefits would then be available to them upon retirement. Plaintiffs identify our supreme court's decision in ***Hartwig v. Bitter***, 29 Wis. 2d 653, 655, 659, 139 N.W.2d 644 (1966), where the court allowed an intentional misrepresentation claim because no employment relationship existed at the time of the misrepresentations. There, the plaintiffs alleged that the defendant, a real estate broker, induced them to work for him, telling them sales were closing quickly and they would make large sums of money. ***Id.*** at 655. Our supreme court refused to dismiss the plaintiffs' claim for misrepresentation.

¶26 Plaintiffs allege in the complaint that pre-employment promises were made suggesting the retirement benefits plan would be in effect when they qualified for retirement. The record, in contrast, contains no evidence of specific pre-employment representations that the retirement benefits would not or could not be changed. Plaintiff Robert Townsend admitted that he had agreed to work

[16] Plaintiffs fail to argue how Miller's and Tatge's "at will" employment status makes the courts' holdings inapplicable in this case. Issues not briefed are deemed abandoned. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

for the district before he even "knew of the existence of the early retirement benefits," and no specific promises were made by Neenah to Townsend personally. Townsend testified at his deposition that any misrepresentation that was made to the teachers was made in 2011, after all the Plaintiffs began their employment with Neenah. Plaintiff Bruce Moriarty admitted that when he was hired Neenah "never directly said that [the retirement benefits] would never change" as "[t]hat would be speculation." Moriarty admitted that Neenah made no promise about a specific retirement plan to him and that he was aware that the union could have negotiated the retirement benefits out of the CBA at any time.

¶27 We reject Plaintiffs' reliance on ***Hartwig*** as the Plaintiffs failed to set forth facts to support a claim for pre-employment misrepresentation.[17] The CBA entered into prior to the Plaintiffs' employment clearly indicates that it is applicable only for a two-year period, at which time the CBA would need to be renegotiated. Although the evergreen clause provided that the retirement plan would "continue in full force and effect" until a new CBA was agreed upon, the Plaintiffs acknowledge that Act 10 precluded Neenah from upholding the terms of the evergreen clause. The CBA itself contained no misrepresentation that the retirement benefits would be perpetually available. Our review of the record fails to show that any of the Plaintiffs testified to specific factual allegations of material misrepresentation upon which they relied upon prior to entering into an

[17] ***Hartwig*** was solely an intentional misrepresentation claim. ***Hartwig v. Bitter***, 29 Wis. 2d 653, 658, 139 N.W.2d 644 (1966). Plaintiffs in this case do not make an intentional misrepresentation claim. As we conclude the facts in this case do not show a pre-employment misrepresentation of any kind, we do not address whether ***Hartwig*** applies to negligent and strict responsibility misrepresentation claims. *See also* ***Betterman v. Fleming Cos.***, 2004 WI App 44, ¶20, 271 Wis. 2d 193, 677 N.W.2d 673 (intentional misrepresentation); ***Hennig v. Ahearn***, 230 Wis. 2d 149, 154-56, 173, 601 N.W.2d 14 (Ct. App. 1999) (intentional misrepresentation).

employment relationship with Neenah under the ***Hartwig*** exception. Thus, we conclude that the negligent and strict responsibility misrepresentation claims based on alleged inducement do not survive summary judgment.

CONCLUSION

¶28 We affirm, as the CBA was an employment contract that represented a valid, bargained-for exchange. The CBA did not include a provision that vested any of the retirement benefits after the expiration of the CBA, and Act 10's prohibition against collective bargaining for benefits effectively voided the protective provisions that the teachers negotiated in the evergreen clause. As a result, Neenah was fully empowered to exercise its discretion in setting the amount of retirement benefits post-Act 10.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.